SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1899.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on Relation of James N. Marr,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The following provisions have always stood in the Constitution of the State of Minnesota:

All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State. Article IX, Section 1.

Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money; but public burying grounds, pub-

lic school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation. Id., Sec. 3.

Prior to 1871 the legislature of said State made certain grants to aid in the construction of railroads, wherein it was provided in substance that the respective grantees should pay into the state treasury annually, in lieu of the ordinary form of taxation, certain percentages, usually three per cent upon their gross earnings. The grants in question were made by special acts of the legislature, and are hereinafter set forth with sufficient fullness to indicate their purport.

With reference to the several railroad companies interested the several acts may be appropriately classified as follows:

1. *The St. Paul & Duluth Railroad Company.*

The act of May 23, 1857, by which the above named company was organized under the name of the Nebraska & Lake Superior Railroad Company, contained no provision relative to taxation.

By an act of the legislature of said State approved Feb. 23, 1865, (S. L. 1865, c. 2), accepting a grant from the United States and transferring the same to the predecessor of the present St. Paul & Duluth Railroad Company, it was provided as follows:

"That in consideration of the lands granted by this act, and of the lands, rights, privileges and franchises which have heretofore been granted to said railroad company, the said company shall, on or before the first day of March of each and every year, after said railroad is completed and in operation, pay into the treasury of the State three per cent on the gross earnings of said railroad, which sum shall be in lieu and in full of all taxation and assessment upon said railroad, its appurtenances and appendages, and all other property of said company, real, personal or mixed, including the lands hereby and heretofore granted to said company, or so intended to be granted. Provided, however, that the lands hereby and heretofore granted to said company shall be subject, like lands of individuals, to be taxed as fast as the same are sold or conveyed, or contracted to be sold, or are leased by said company, or the stumpage upon any lands is sold or contracted to be sold by said company," etc.

Eight days later, by an act approved March 3, 1865, (S. L. 1865, c. 81), the legislature of that State modified the terms of the last named act by providing, so far as material, as follows:

"Provided that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year, pay into the treasury of the State one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after thirty

> miles of said railroad shall be completed and in operation; and shall during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this State, on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad; and shall, from and after the expiration of said seven years, on or before the first day of March of each and every year, pay into the treasury of this State, three per cent on the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatever."

The St. Paul & Duluth Railroad Company is the successor by foreclosure proceedings to the company above named, and acquired in virtue of General Laws Minnesota, 1876, Chapter 30, "all and singular the same rights, powers, privileges, immunities and advantages" enjoyed by its predecessor.

2. *Northern Pacific Railroad Company.*

This company received its land grant direct from the Federal Government by an act of Congress approved July 2, 1864, which, in addition to making the grant, created the corporation. For manifest reason it was silent upon the subject of taxation. Section eighteen thereof is as follows:

> "And be it further enacted that said Northern Pacific Railroad Company shall obtain the consent of the legislature of any state through which any portion of said railroad line may pass, previous to

commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature."

The consent of the state therein required was given by an act of the legislature, approved March 2, 1865.

The first law enacted especially providing for the taxation of the Northern Pacific Company was enacted in 1870, and provided that the lands, franchises, property, etc., of the company should be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and should be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property, etc., of the Lake Superior & Mississippi Railroad Company, now the St. Paul & Duluth Company.

3. *The Minneapolis & St. Cloud Railroad Company.*

The initial act of incorporation of this company was approved March 1, 1856 (S. L. 1856, c. 150), which contained no provision as to taxation of its property. The act was amended February 23, 1864, but the amendatory act was also silent upon the subject. (S. L. 1864, c. 5).

This company received its grant by an act approved February 11, 1865 (S. L. 1865, c. 3). The granting act was also silent on the subject of taxation.

An act was approved February 28th of the same year, amending the original incorporation act and repealing certain provisions of the act of 1864, but making no reference to the subject of taxation.

An act was approved March 5, 1869, which was also silent as to taxation. (S. L. 1869, c. 53.)

The act which prescribes the method of taxation of this property was approved March 3, 1870, section one of which, so far as material, is as follows: (S. L. 1870, c. 52.)

> "That in consideration of an annual payment of a per centum upon the gross earnings of the Minneapolis & St. Cloud Railroad, as herein provided, the road, its appurtenances and appendages, and all other property, estate and effects of the Minneapolis & St. Cloud Railroad Company which they have already acquired, or which they may hereafter acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all assessments and taxation, etc. * * * And the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever."

In 1871 the people of said state adopted an amendment to their Constitution in form as follows:

> "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state or operating its railroad therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain per centum therein mentioned of thegross earn-

> ings of the railroad companies now existing, or hereafter organized, shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."
>
> *Const. Minn.*, Art. IV, Sec. 32a.

Pursuant to the said amendment of 1871 the legislature of said state submitted to the voters thereof, at a general election held therein in the month of November, 1896, for their approval or rejection, the statute enacted in 1895, providing for the taxation by the ordinary method of all lands granted to railroad companies. The statute so submitted was adopted, the first three sections of which are as follows:

> "Sec. 1. All lands in this state heretofore or hereafter granted by the State of Minnesota or the United States, or the Territory of Minnesota, to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for rights-of-way, gravel pits, side-tracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroad of said companies; provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as is now provided by law, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands.

"Sec. 2. Such portion or portions of any act or acts, general or special, of the State or Territory of Minnesota, heretofore enacted, which provides or attempts to provide for any exemption of the lands hereby declared taxable from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

"Sec. 3. If this act shall be held to be void, so far as it applies to the lands of any particular railroad company in this state, it shall not be ground for declaring it void of any application to any other company not similarly situated."

Laws Minn, 1897, p. X.

Pursuant to the passage and popular approval of said act of 1895, the county auditor of the County of Aitkin in said State, was proceeded against by the defendant in error, who sought to compel him by writ of mandamus to place upon the tax lists of his county for the purpose of taxation, the several tracts of land the tax whereon is now in controversey.

The Supreme Court of Minnesota decided, by its decision rendered in 1898 (see record) that the said tracts are taxable by reason of the passage and approval of said statute of 1895.

Reported, 72 Minn. 200.

The plaintiff in error resists the taxation of said several tracts under the said statute, on the ground that by reason of the terms of the several granting acts above referred to the respective railroad companies thus acquired contract rights which are inviolable under the Constitution of the United States.

ARGUMENT.

I.

It was not in the power of the legislature of Minnesota to enter into a contract with either of the respective railroad companies, whereby it would be relieved of its just proportion of taxation for state and local government.

The above proposition is based on the legal effect of Article IX, Sections 1 and 2, of the Constitution above cited.

That the several special acts relied on by the respective companies did not create contract rights, and that that was the common understanding of the people of the State as well as of the companies themselves, is abundantly demonstrated by the constitutional amendment of 1871, above quoted; that that amendment was inspired by the officers and agents of the compannies interested, is clearly presumable. This court has heretofore observed that corporate charters emanate from such sources. If this is a just inference, it naturally follows that the companies sought the adoption of the amendment for the reason that they then understood that they had not acquired contract rights. It is plainly obvious that if the companies stand upon the amendment of 1871 as the ratification of unconstitutional statutes, they must accept that amendment as an entirety and subject to all it signifies or implies.

As pointed out by the Supreme Court of Minnesota in the case of *State v. Luther*, 56 Minn. 156, that amendment performed a two-fold purpose, namely (1) it validated pre-existing laws; and (2) it authorized the enactment of commutation laws in the future.

By the very term of the amendment no law past or future, so enacted, could be repealed or modified without popular approval secured in the manner therein provided. But *Pro hac vice* every law so enacted was to be subject to repeal in the constitutional way.

The Supreme Court of Minnesota in its opinion in this cause declared the said special laws unconstitutional. It there said:

> "We place our decision that the statutes under which the railroad companies claim did not constitute irrevocable contracts between them and the state that their lands should never be taxed as other land is taxed by the state, upon the broad ground that when the statutes were enacted they were unconstitutional. Such statutes were in violation of Article IX, Sections 1-3 of the Constitution (of Minnesota)"
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> *State ex rel v. Stearns*, 72 Minn., at p. 200.

In concluding its opinion that court employed the following language:

> "We hold that the statutes under which it is claimed that the lands in question are exempt from taxation in the ordinary way, upon the basis of their cash valuation, were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. *State v. Luther*, 56 Minn. 156. But this ratification or validation of the statutes was a qualified one and the right to repeal or amend them was reserved by necessary implication, provided such repeal or

> amendment was adopted and ratified by a majority of the electors. Our conclusion is that chapter 168, Laws 1895, does not impair the obligation of any contract between the state and railway companies, and that the lands here in question are taxable in the ordinary way, as other lands are taxable."

Keeping in mind then that the statutes were, so far as they provided for the commutation system of taxation, invalid, it is irrational to say that any contract rights arose from the adoption of the amendment of 1871.

It was suggested upon argument in the State Supreme Court, and may be here, that there can be no change in the law unless both parties consent to it, but this is clearly a *petitio principii*. It assumes the existence of a contract. It is perhaps unnecessary to remark that there is nothing in the amendment itself which justifies the contention. The Supreme Court of Minnesota did not deem it of sufficient merit to be noticed in its official opinion.

Elsewhere we attempt to show that under the Constitution of Minnesota the legislature of that state has at all times been devoid of the power to grant exemptions from taxation or to enter into a contract with any person or corporation having the effect of an exemption save as is expressly provided in the Constitutional amendment of 1871.

II.

The State Supreme Court having decided that Article IX, Sections 1 and 3 forbade the granting of any immunity from taxation in form provided in the special laws in question, and that they were to that extent unconstitutional, such construction by the state court will be followed by this court, unless clearly wrong.

In support of this proposition we submit the following cases:

Harperding v. Dutch Church, 16 Peters 493.
Ellendorf v. Taylor, 10 Wheat. 153.
Davie v. Briggs, 97 U. S. 628.
Memphis & Charleston R. R. Co. v. Gaines, 97 U. S. 697.
Com. Bank v. Buckingham, 5 How. 317.
Moores v. National Bank, 104 U. S. 625.
Tioga R. R. Co. v. B. & C. P. R. Co., 87 U. S. 137.
Flash v. Conn., 109 U. S. 371.
Stone v. Wisconsin, 94 U. S. 183.
Post v. Kendall, 105 U. S. 669.
Pittsburg C. C. & St. L. R. R. Co. v. Backus, 154 U. S. 421.
Burgiss v. Seligman, 107 U. S. 32.

We are aware that it is a rule of this court to adopt the construction for itself of a state law where contracts have been entered into and rights accrued thereon prior to a construction by the highest state court.

Notwithstanding such rule this court is slow to depart from a construction of a state constitution or statute by

its highest judicial authority, and will not do so unless such construction is manifestly unsound.

In *Burgiss v. Seligman, supra*, it is said:

> "But even in such cases for the sake of harmony and to avoid confusion, a federal court will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid any unseemly conflict with the well considered decisions of the state court."

In *Gilman v. City of Sheboygan*, 2 Black, at p. 518, referring to a construction placed upon the constitution of Wisconsin by the Supreme Court of that State, this court say:

> "Acting upon a principle recognized in its demonstration from the earliest period of its history, this court considers itself bound in cases like this to follow the settled opinions of the highest state court giving construction to the constitution and laws of the state."

In *Railroad Companies v. Gaines, supra*, the court say:

> "The decision of the supreme court of the state declaring this section to be invalid so far as it relates to companies not claiming to be exempt from taxation under their charters, because it does not conform to the constitutional requirement of uniformity, is binding upon us as the construction of a state statute by the highest court of a state. While

we are not bound by the decision in the present case that the section is also invalid as to this company after the expiraton of the time to which the exemption of its property was limited by its charter (*Jefferson Branch Bank v. Skelly*, 1 Black 436; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116), the decision ought not to be overruled unless it is clearly wrong. The delicate power which we have under the Constitution of the United States over the judgment of the state courts ought always to be used with the greatest caution."

In *Merchant Bank v. Pennsylvania, supra*, the court say:

"It is sufficient to say in relation to this contention, that the decision of the Supreme Court of the State of Pennsylvania sustaining the statute, is conclusive in this court as to any question of conflict between it and the state constitution." Citing:

West River Co. v. Dix, 6 How. 507.
Beecher v. Cheshire Rd., 125 U. S. 555.
Bell's Gap. Rd. v. Penn., 134 U. S. 232.
Lewis v. Morrison, 151 U. S. 545.
Adams Express Co., supra.
Long Island W. S. Co. v. Brooklyn, supra.

In *Davie v. Briggs, supra*, the court quoting from *Murray v. Baker*, 3 Wheat 551, say:

"An adherence by federal courts to the exposition of the local law as given by the courts of the state, will greatly tend to preserve harmony in the exercise of judicial power in state and federal tribunals."

In *Commercial Bank v. Buckingham, supra,* the Court say:

> "It is the peculiar province and privilege of state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them, under the pretense that their judgments have impaired the obligation of contracts."

In Flash v. Connecticut, supra, a case involving the liability of stockholders of certain corporations, the court say:

> "We think this a case where the construction of the state court is entitled to great if not conclusive weight with us. It is the settled construction of a law of the state upon which the rights and liberties of a large number of its citizens must depend. * * * It is clear that confusion and uncertainty would result should the state and federal courts place different constructions on the sections. Such result ought, if possible, to be avoided. It is true that this decision was made after the defendant had become a stockholder in the Pensacola Lumber Co., but there had been no previous contrary decision."

There would seem to be few, if any cases, where the reason for adopting the construction by a state court of a state statute would appeal with stronger force than in the case at bar. In *Flash v. Connecticut, supra,* the construction of the Supreme Court of Connecticut was followed because the rights and liberties of large numbers of citizens of that state were dependent upon the settled construction of the law. Every property owner and taxpayer

in Minnesota is dependent upon the settled construction of their constitution. If the construction of the state court is sustained by this court, it will mean that the tax payers of counties embracing large areas of granted railroad lands will be taxed by rules of justice and equity, instead of being taxed as at present by most unjust and inequitable rules. It is a hardship which cannot be gainsayed to impose upon the ordinary taxpayers of a county all the burdens of taxation---county, township and school district---when, as is the case in some of said counties, the untaxed railroad lands constitute a large area of such counties. If such consideration may influence this court in applying the rule of observance of the construction made by a state court, the case at bar presents an instance of unusual merit. This court has said:

> "As the whole community is interested in retaining it (the taxing power) undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a state to abandon it does not appear.
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> *Piqua Bank v. Knoop*, 16 How. 369.

Two classes of special legislation upon the subject exist, and should be distinctly observed in reading the decision of the Supreme Court of Minnesota, namely, (1) those enacted prior to the adoption of the Constitution in 1858; and (2) those subsequently enacted.

As to the former, the uniform holdings of that court, following the decisions of this court, are to the effect that they constitute contracts, but from the uniform tenor of these decisions it may be safely said that they inferen-

tially repudiate the doctrine that contracts could be created under the constitution of 1858.

Beginning with the early case of *First Division Co. v. Parcher,* 14 Minn. 297, a case which is generally regarded as asserting a most extreme and novel doctrine, we there find the court studiously placing its decision upon the fact that the rights of the company antedated the constitution. By an amendment to the constitution adopted April 15, 1858, the state authorized the issuance of its bonds to aid certain railroad companies in the construction of their respective lines. The amendment provided that the state should have a lien upon the property of the companies, and might upon forfeiture in the payment of the principal or interest, foreclose its lien and purchase the property in its sovereign name. It was further provided that the purchaser, whether the state or an individual, should acquire all the rights, privileges, grants, franchises, immunities and advantages enjoyed by the company so aided. Default was made and the state purchased, and the court thereupon held that the state acquired all the rights, privileges, grants, etc., of the defaulting company, and held them without merger or extinguishment, by virtue of an act passed in 1862, the said rights, privileges, grants, etc., were transferred to the St. Paul & Pacific Railroad Company.

It was contended in that case that the land grant involved in the proceeding became taxable, but the court held that a contract had been acquired under the territorial charter, which survived the foreclosure and passed to the St. Paul & Pacific Company.

In 1877 a case arose in the Supreme Court of Minnesota involving the taxability of a certain banking house. Sec.

4 of Article IX, of the Constitution of that State provided:

> "Laws shall be passed for taxing the notes and bills discounted or purchased, moneys loaned and other property, effects or dues of every description, of all banks and all bankers, so that all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals."

This provision was involved in *Commissioners v. Citizens National Bank*, 23 Minn. 280, referring to sections 1, 3 and 4 of Article IX, say:

> "The leading and controlling purpose of these provisions was to subject all property, of every kind and nature, within the jurisdiction of the state, except such as is specially authorized to be exempted, to taxation upon a basis of a cash valuation, and to secure, so far as practicable, absolute equality and uniformity in the apportionment of taxes, so that every piece of property should bear its just and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the state."

It further said:

> "As equality in taxation is the constitutional policy of this state, no scheme of taxation can be presumed to have been intended by the legislature, which necessarily involves, in its practical results, the imposition of a greater proportionate share of its burdens upon moneyed capital invested in the business of banking under national laws, than is imposed upon capital similarly employed under state authority."

In *City of St. Paul v. St. P. & S. C. R. R. Co.*, 23 Minn. 469, was presented the question of the taxability of certain property of the defendant, situate in the city of St. Paul. The defendant had acquired the grant from the city in 1857, coupled with an exemption of its land from all taxation, and requiring the annual payment of three per cent. of the gross earnings of its road in lieu of all taxes whatsoever upon the property of the company.

The court say:

> "The line of the railroad in question, together with the lands, property, immunitites and franchises pertaining thereto, is held under a grant made prior to the adoption of the Constitution, and is hence unaffected by any of its provisions relating to the taxing power and the mode in which it shall be exercised. This was fully settled by this court in the analogous case of *First Division St. Paul and Pacific R. R. Co. v. Parcher*, 14 Minn. 297. Upon the renewal of the grant in 1864 to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions so as to require the annual payment of a different rate per cent. of the gross earnings of the road to commence upon the completion of thirty instead of fifty miles, and in consideration of such annual payment to exempt the railroad, its appurtenances and other property, from all taxation and from all assessments, both general and local. This modification of the original contract was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard has not

> only been uniformly recognized and acted upon ever since as valid by both the executive and legislative departments of the state government, but by an express constitutional amendment adopted in 1871 it has been placed beyond the reach of any amendment or repeal, *except by a law ratified by a vote of the electors of the state.*"

A case arose in 1891 involving the charter of Hamline University, Minnesota, granted in 1854, wherein it was provided that

> "All corporate property belonging to the institution, both real and personal, is and shall be free from taxation."

It was contended that the legislature of the territory had no power to grant any such special exemption to the University; and that it was not binding upon the future state. It was held, however, that the contentions were untenable, following *First Division Co. v. Parcher, supra.*

> *County of Nobles v. Hamline University,* 46 Minn. 316.

In *State v. Luther,* 56 Minn. 156, is presented a case involving the taxability of granted lands of the St. Paul & Duluth Company, one of the companies whose lands are involved in the suit at bar. The state there contended that such lands were taxable in the ordinary method; but it was adjudged that the gross earnings tax applied to them as well as to the other classes of property employed in the operation of its road.

The court say at page 162:

> "If there is anything in counsel's point, both classes of property must, under the constitution, be

taxed according to its true value in money. The question is one that affects the whole tax system of the state. If all such laws are invalid the consequences would be most serious, affecting the taxation, not only of railroads, but also of mining, insurance, telegraph, telephone and express companies, and the like, most, if not all of which, have been taxed for years on the basis of their receipts or earnings. We do not care to pass upon or consider a question of such great importance until it is necessary, and we do not think that the question arises in this case. *Conceding, without deciding, that tax laws such as we are now considering were invalid when enacted, still we are of opinion that the effect of the constitutional amendment of* 1871 (*Article* 4, *Section* 32*a*) *was to validate all such laws relating to the taxation of railway property.*"

Later on in the decision the court say, referring to the said amendment of 1871:

"This language must have been selected and this amendment adopted with reference to the existing legislation and the general legislative policy to which we have referred; and, read and construed in that light, it amounts to a clear recognition of the validity of existing laws providing for this commuted system of taxation of railroad property and lands, and of legislative power to enact such laws for the future. If it did not refer to this, there was nothing to which it could refer. It is, by necessary implication, a validation of past legislation of that kind, and a grant of power to enact it in

> the future. It is pretty clearly indicated in *City of St. Paul v. St. Paul & S. C. R. Co.*, 23 Minn. 469, and *County of Stevens v. St. Paul, M. & M. Ry. Co.*, 36 Minn. 472, that this was the view then entertained by the court. Within a year and a half after the adoption of this constitutional amendment, the legislature passed a general law (1878 G. S. ch. 11, Sections 128, 129) providing for this system of taxation for any railway company that would accept the provisions of the act; and this system has been universally in vogue down to date, without question as to its validity, until raised in this case."

After the decision in the last cited case had been announced an application for a re-hearing was made. In denying such application the court say:

> "But inasmuch as an *obiter* remark in the opinion might be understood to mean that acts providing for a commuted system of taxing railroad property and granted lands constitute contracts between the state and the railway companies which cannot be repealed or amended, it is proper to say that no such question was before the court and that the remark referred to was not intended to express or intimate any opinion upon that point."

In 1898, another case arose in the Supreme Court of Minnesota involving the constitutionality of a law of that state enacted in 1881, providing for the taxation of mining properties. The same able judge who wrote the opinion in *State v. Luther, supra*, wrote the opinion of the court, and in answer to the question certified by the trial court, namely, "Is the method of taxing mines and mining corpor-

ations, provided by Gen. Laws 1881 (Ex. Sess.) c. 54, constitutional?" gave answer as follows:

> "A comparison of the provisions of the act of 1881 with those of Article IX, Section 1, of the Constitution of the state, will furnish the answer to the first question, namely, for each ton of copper, 50 cents, and for each ton of iron ore mined and shipped, or disposed of, one cent. *It would be difficult to conceive of a system of taxation more obnoxious to the constitution.* We answer the first question in the negative."

The distinction between the case last cited and the Parcher and other analogous cases, is that while it involves the rights of a mining corporation, the other cases had to do with railroad companies. The constitutional amendment of 1871, above referred to, was restricted in scope to railroad companies and was not therefore involved in the said mining case. That case presents the clear cut issue whether the legislature had the authority in 1881 to exempt any company from the payment of its just proportion of the taxes. It is precisely the question which would now be presented by the case at bar with the amendment of 1871 eliminated.

While it cannot be said that the provisions of the Minnesota Constitution in question had been construed by the Supreme Court of that state prior to the dates when the several special laws above referred to were enacted, it is obvious that the doctrine of its courts, the understanding of its legislatures and of its voting population has always been that the special acts in question had no force as valid laws until validated by the amendment to the Constitution in 1871.

Attention should be called to two other recent cases adjudged by the Supreme Court of the State of Minnesota, involving the construction of the provisions of the Constitution of that state above referred to.

State v. Cooley, 62 Minn. 183.

State v. Pioneer Sav. & Loan Co., 63 Minn. 80.

In *State v. Cooley, supra*, the question was whether certain real estate was taxable. By an ordinance of the City of Minneapolis, and a contract made pursuant thereto by the city with the owner, the city gave him a franchise to maintain a market house and place on said premises, to be used exclusively as a public market, for the period of twenty-five years. The ordinance provided that during the said period the entire premises should be exempt from taxation. The relator sought the issuance of a writ of mandamus to compel the county auditor of the county in which said city is situated to place the property on the tax books of the county, and to assess the same. The court, referring to said Sec. 3 of the Minnesota Constitution, say:

> "Clearly, the exemption clause in the constitution was never designed to cover such a case. If it was, the legislature could amend the present statute so as to exempt from taxation street car, water, gas, and electric light companies, and a variety of private enterprises organized and operated for pecuniary gain, but owned by the public in the same general sense, serving the public, and devoted to or used for public purposes, quite as exclusively as is the property in question. *We are sure that an amendment to the tax law through which such an*

exemption was attempted would at once be pronounced unconstitutional."

State v. Poincer Savings & Loan Co., supra, was decided in December, 1895, and involved the validity of a statute providing for the taxation of the property of corporations like the defendant in that case.

The court, citing said sections 1 and 3 of the constitution of that state, say:

> "The provisions of the fundamental law of the state are imperative, and require that taxes shall be uniform and equal, as near as may be, and that all property not exempted by the constitution shall be taxed according to its true value in money. The method of securing these results is left with the legislature, and the mere fact that the statute here in question seeks to take building and loan associations of the class to which the defendant belongs out of the operation of the general tax laws of the state does not make the statute unconstitutional, provided it secures substantial equality of taxation of all of the property held or owned by the class for whose benefit the law was enacted. *But, whatever the method adopted, the legislature cannot, directly or indirectly, exempt any property from taxation which the constitution does not so exempt."*

This is a strong case as it holds to the doctrine that the exemption clause of the constitution of Minnesota is exclusive.

In view of the terms of sections one and three of Article 9 of the Constitution of Minnesota, it cannot justly be said, it would seem, that the legislature was clearly authorized to enter into contracts exempting property from

taxation or with respect to the mode of taxing railroad property, or that the Supreme Court of that state has placed a construction upon the said sections at variance with the contention of the defendant-in-error.

III.

Where a contract is claimed, it must be clearly shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it.

We would emphasize the fact that the plaintiff in error contends for a contract and nothing else. It is not the mere question whether the properties of railroad companies shall be taxed by the one mode or the other, but whether such companies have secured the right to be taxed in a particular way at an invariable rate. If it were merely a question of manner or mode of taxation, the question would be of comparatively slight importance, as substantial equality of taxation might then be attained by raising or lowering the rate as justice should require. But it is the position of the plaintiff-in-error, that during all time, however great the burden of taxation upon the owners of other classes of property, and however unjustly disproportionate to that levied upon other classes of property, the taxes contributed by the railroad companies may be, those companies may successfully resist any increase of taxation by reason of their contracts.

The significance of the attitude of the plaintiff-in-error is all the more obvious when it is remembered that under their pretended contracts they enjoyed perpetual exemption from county and municipal taxation.

The case then clearly justifies the application of that strict rule so often applied by this court, when similar questions have been presented to it.

> "It is manifest that legislation which, it is claimed, relieves any species of property from its due proportion of the general burdens of the government, should be so clear that there can be neither reasonable doubt nor controversy about its terms. The power to tax rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment."
>
> *Bailey v. Magwire*, 22 Wall. 217.

> "The contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. When it exists, it is to be rigidly scrutinized and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require. It is in derogation of public right and narrows a trust created for the good of all."
>
> *Tucker v. Ferguson*, 22 Wall. 528.
>
> *Vicksburg R. Co. v. Dennis*, 116 U. S. 668.

> "The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arises as to the intent of the legislature, it must be solved in favor of the state."
>
> *Hoge v. Richland & Danville R. R. Co.*, 99 U. S. 348.

See also,

Railroad Companies v. Gaines, 97 U. S. 697.

While this court has long been committed to the doctrine that a legislature unrestrained by constitutional prohibitions may contract away the power of taxation, that doctrine has encountered the strongest dissent from some of its ablest members.

The views of the late Justice Miller, expressed in his dissenting opinion in

Washington University v. Rouse, 8 Wall. at page 443.

are unanswerable, and it is hoped will ultimately become the law of this country. The prevailing doctrine of this court is undoubtedly adhered to because of the view that by its overthrow injustice would result to those who have contracted thereunder. This court said in *Bailey v. Magwire, supra*: "It were better for the interests of the community that this power (of taxation) should on no occasion be surrendered."

We would respectfully submit whether a rule founded in acknowledged injustice to the public, which concedes to a legislature the power to barter away one of the most essential attributes of sovereignty, and which has long been enjoyed by the wealthy at the expense of the poor, should longer be adhered to?

Said the late Justice Miller in the case last referred to:

> "To hold, then, that any one of its annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is

strictly lawful. * * * * * If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all burdens of supporting the government. * * * With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies which can never be finally closed by the decisions of the court, and that the one we have considered is of this character. We are strengthened in this view of the subject by the fact that a series of dissents from this doctrine by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defense of our views, we content ourselves with those renewing the protests against a doctrine which we think must be finally abandoned.

"The power of the legislature of a state to exempt particular parcels of property of individuals or of corporations from taxation, not merely of its own existence, but so as to be beyond the control of the taxing power of succeeding legislatures, has been asserted in several cases by this court, although

against this doctrine there have been earnest protests by individual judges."

In the recent case of *Ford v. Delta and Pine Land Co.*, 164 U. S. 666, this court, by Mr. Justice Brewer, took occasion to remark:

> "Indeed, there has been strong judicial dissent from the doctrine of the power of the state legislature to create a permanent exemption from taxation." Citing:
>
> *Washington University v. Rouse, supra.*

IV.

The contention that contracts exist is opposed by the weight of judicial authority, both federal and state.

This court has in a series of cases become committed to the doctrine that under provisions like those of the Minnesota constitution, contracts stipulating away the power of taxation cannot be made.

Welch v. Cook, 97 U. S. 541.
Railroad Cos. v. Gaines, 97 U. S. 697.
Huntington v. Worthen, 120 U. S. 97.

In *Welch v. Cook, supra,* was involved a statute enacted by the legislative assembly of the District of Columbia in 1873, which provides that

> "All property, real and personal, which may hereafter be actually employed within the District of Columbia for manufacturing purposes, shall be exempt from all general taxes for a period of ten

years from date of this act going into effect. Provided, that the property so employed for manufacturing purposes shall not be less than $5,000.00"

By an act of Congress approved June 20, 1874, it was provided:

"That for the support of the government of the District of Columbia, and to maintain the credit thereof for the fiscal year ending June 30, 1875, there shall be levied on all real estate in said District, except that belonging to the United States and the District of Columbia, and that used for educational purposes, the following taxes, etc."

The plaintiff alleged that pursuant to the said act of 1873, he had expended large sums of money in reliance upon the exemption therein provided, and sought to enjoin the collection of taxes under the act of Congress.

It was held, following *Salt Co. v. E. Saginaw,* 13 Wall. 373, that no contract existed.

We cite the case, not because we deem it similar to the case at bar, for it is quite obvious that it was governed by *Salt Co. v. E. Saginaw,* and is not distinguishable from several other of the cases adjudged by this court. We deem it instructive here because of the striking similarity between the language of the repealing act of Congress and said Section 3 of the Constitution of Minnesota, and the construction placed by this court upon the language of that act.

Congress provided that:

"There shall be levied on all real estate in said District, etc., * * * * the following taxes."

The Constitution of Minnesota provides that:

"Laws shall be passed taxing * * * all real

and personal property * * * except, etc."

"We are to presume," say this court, "that Congress knew that as the law stood on the 20th of June, 1874, the property in the District was liable to taxation, with certain exceptions, and that it knew of what such exceptions consisted. We are also to presume that it appreciated the effect of its action when it took upon itself anew and in derogation of the local authorities the duty of fixing the subjects of taxation, and that it knew that the result of declaring all of the property, with certain exceptions, to be liable to the payment of taxes for the year ending June, 1874, was to make that act stand in place of all others upon the subject."

May it not with equal force be presumed that the framers of the Constitution of Minnesota knew that the result of declaring that laws shall be passed taxing all real and personal property, except the enumerated classes, was to make the Constitution stand as a supreme and exclusive rule upon the subject?

The constitutional mandate to the legislature is, You shall not tax public burying grounds, public school houses, public hospitals, etc., but you shall tax every other species of property. It is idle to say that the terms of the constitution are merely directory in purpose, for they are not only mandatory in reason, but likewise so in the very words employed. The language is not that laws may be passed, but that they shall be passed. The legislature might be derelict in its duty, it might disregard the solemn mandate of the constitution, but the duty would nevertheless be ever pressing upon it, losing none of its force by legislative neglect, however long continued.

The rule prescribed to the legislature by the constitution is, as was well said by the Supreme Court of Minnesota, in *State v. Pioneer Savings and Loan Association*, 63 Minn. 80, that "taxes shall be uniform and equal, as near as may be, and that all property not exempted by the constitution shall be taxed according to a uniform rule."

It cannot be successfully urged that a distinction can be drawn between the rights of Mr. Welch and those of the railway companies interested in the case at bar, because he claimed under the general law while they claim under special laws, for this court held in *Salt Co. v. E. Saginaw, supra*, that:

> "Corporations formed under general laws in place of special charters are entitled to the specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters."

In *Railroad Cos. v. Gaines, supra*, was presented a question quite analogous to the one in the case at bar.

The constitution of Tennessee, Art. 2, Sec. 28, contains the following provisions:

> "All property, real, personal or mixed, shall be taxed; but the legislature may except such as may be held by the state, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct so the taxes shall be equal and uniform throughout the state."

Certain railroad companies whose rights were taxed in that case, claimed exemption from taxation pursuant to an act of the legislature of Tennessee enacted in 1875. This court say:

> "The claim on the part of the company is that by the acceptance of this section as an amendment to its charter, a valid contract was entered into between the state and the corporation, regulating the taxation of the company until the year 1885. It is said that the release by the company of the perpetual exemption of its capital stock and of the exemption of its property until 1877, which were granted by the original charter, was a sufficient consideration for an agreement on the part of the state not to tax the company otherwise than according to the accepted eleventh section for ten years, and that a law which provides for taxation in different manner impairs the obligation of that contract.
>
> "The decision of the supreme court of the state declaring this section to be invalid so far as it relates to companies not claiming to be exempt from taxation under their charters, because it does not conform to the constitutional requirement of uniformity, is binding upon us as a construction of a state statute by the highest court of the state. While we are not bound by the decision in the present case that the section is also invalid as to this company, after the expiration of the time to which the exemption of its property was limited by its charter, * * * *the decision ought not to be overruled unless it is clearly wrong.* The delicate power

> which we have under the constitution of the United States over the judgments of state courts, ought always to be used with the greatest caution. There should be no reversal of such judgments unless the error is manifest."

It will be observed that the Supreme Court of Tennessee construing the statute of that state, not essentially different from that of Minnesota, held that under its terms "no valid contract could be made with a corporation for an exemption from taxation," and that the constitution had "subjected all property in the state to the burden of uniform taxation according to its value."

If the constitution of that state then received a correct interpretation, it would seem to follow with absolute certainty that the legislature of Minnesota could not, between 1858 and 1871, either exempt property from taxation or provide for its taxation except according to a uniform rule. That is to say, it could not adopt an inelastic rule which in the course of time would result in relieving property of its just proportion of taxes. The constitution prescribes a rule from which there is no variance or shadow of turning.

Section 11 of the charter of the Mobile & Ohio Rd. Co., one of the companies whose property rights were involved in that case, provided:

> "That the capital stock of such company shall be forever exempted from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or fixtures which will reduce dividends below eight per cent."

Huntington v. Worthen, supra, is also well in point. The constitution of Arkansas is quite similar in legal effect to that of Minnesota. Its exemption clause is strikingly so. It is true that it contains also the words "all laws exempting property from taxation other than is provided therein, shall be void." Such words are accumulative and precautionary, and do not, it would seem, add to the legal effect of what precedes. The framers of the constitution employed them merely to leave no room for doubt that "all property" save the enumerated classes expressly exempted, should "be taxed according to its value," and the rate of the same should be "equal and uniform throughout the state."

This court, by Mr. Justice Field, say:

> "As thus seen, no part of the property of railroad companies in the state is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly."

In saying that no part of the property of railroad companies is exempt from taxation, Mr. Justice Field must have been speaking with reference to the exemption clause wherein the several classes of exempted property are enumerated. To that fact he couples the other, by way of emphasis, that any law which exempts such property, is in express terms declared to be void. It is obvious that the decision of the court is not rested upon the force of the language declaring such laws void, but upon what precedes.

The contention of the defendant in error is sustained by the weight of state judicial decisions.

Certain propositions are now elementary in the law of taxation, among which are the following:

1. A legislature, in the absence of constitutional restraint, is vested with plenary power over the subject.

2. The rule of equity and uniformity does not preclude the exemption of one or more classes of property, but is satisfied when the tax rests with equal weight upon all the subjects selected for taxation.

An examination of the constitutions of the several states will disclose a wide difference between them as to their respective provisions prescribing the authority of the legislature over the subject.

In many of the states no restraint whatever is placed upon the legislature, while in others the restraint goes no further than to impose a limitation somewhat similar to that expressed in Article 9, Sec. 1, of the Constitution of Minnesota, which enjoins equality and uniformity. The instances are extremely rare where the constitution is substantially similar to Art. 9, Sec. 3, of the Constitution of Minnesota.

When this cause was before the state supreme court the plaintiff in error cited cases arising in the following states:

Wisconsin,	New Jersey,
Iowa,	Pennsylvania,
Kansas,	Mississippi,
Louisiana,	Illinois,
Michigan,	Arkansas.

In order to demonstrate that the cases arising in such states do not meet the contention of the defendant in error, the constitutional provisions involved are for convenience herein reproduced, and are as follows:

Wisconsin.

"The rule of taxation shall be uniform, and taxes shall be levied upon said property *as the legislature shall prescribe.*" Article 8, Sec. 1.

Iowa.

"The general assembly shall not pass local or special laws in the following cases.

* * * * For the assessment and collection of taxes for state, county or road purposes." Article 3, Sec. 30.

Kansas.

"The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least $200 for each family, shall be exempt from taxation." Article 9, Sec. 1.

Louisiana.

"Taxes shall be equal and uniform throughout the state. After the year 1848 all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed more than another species of property of equal value on which taxes shall be levied; the legislature shall have the power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession." Title 5, Art. 127.

Michigan.

"The legislature shall provide a uniform rule of taxation except on property paying specific taxes, and taxes shall be levied on such property and shall be prescribed by law." Article 14, Sec. 11.

"All assessments hereafter authorized shall be on property at its cash value." Id. Sec. 12.

New Jersey.

"Property shall be assessed for taxation under general laws and by uniform rules according to its true value." Article 7, Sec. 12.

Pennsylvania.

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may by general laws exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." Article 9, Sec. 1.

"All laws exempting property from taxation, other than the property above enumerated, shall be void." Id. Sec. 2.

Mississippi.

"Taxes shall be uniform and equal throughout the state. Property shall be taxed according to its value. The legislature, however, may impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed

for taxation under general laws and by uniform rules according to its true value, but the legislature may provide for a special mode of valuation and assessments for railroads and railroad and other corporate property, and for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county." Art. 5, Sec. 112.

Illinois.

"The general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, canvassers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn keepers, grocery keepers, toll bridges and ferries, and persons using and exercising franchises and privileges, in such manner as they shall from time to time direct." Article 9, Sec. 2.

"The property of the state and counties, both real and personal, and such other property as the general assembly may deem necesary for school, railroads and charitable purposes, may be exempted from taxation." Id. Sec. 3.

Arkansas.

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the general assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper. Provided further, that the following property shall be exempt from taxation: public property used exclusively for public purposes; churches, used as such; cemeteries used exclusively as such; school buildings and apparatus, libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity." Article 16, Sec. 5.

"All laws exempting property from taxation other than as provided in this constitution shall be void." Sec. 6.

We offer the following suggestions relative to the foregoing constitutional provisions:

1. That in Wisconin it is expressly left to the discretion of the legislature to prescribe taxable property.

2. That in Iowa it is merely a prohibition against the passage of local and special laws upon the subject of taxation.

3. That in Kansas there must be a uniform and equal rate of assessment and taxation, and that certain specified classes shall be exempt. There is no provision, as in Minnesota, *that all property shall be taxed.*

4. That in Louisiana taxes shall be equal and uniform, and that after the year 1848 all property on which taxes may be levied shall be taxed by a proportionate rule.

5. That in Michigan taxes shall be levied on such property *as shall be prescribed by law*. That is, by the legislature.

6. That in New Jersey it is merely required to tax under general laws by uniform and ad valorem rules.

7. That in Pennsylvania there is an express prohibition against the exemption of any class of property save those expressly enumerated.

8. That in Mississippi the constitution does not provide in terms that all property shall be taxed, but merely that taxation shall be uniform, equal and ad valorem. That railroad and other corporate property may be taxed by special mode of valuation and assessment.

9. That in Illinois every person and corporation shall be taxed according to the value of his property. That certain classes, involving those using and exercising franchises and privileges, may be taxed in such manner as the general assembly may from time to time direct; and that certain classes of property may be exempted, and none other.

The cases cited in the court below by the plaintiff-in-error arising under the foregoing constitutional provisions, are the following:

Wis. Central R. R. Co. v. Taylor, 52 Wis. 37.
Trustees v. Iowa, 46 Ia. 275.
R. R. Co. v. Morris, 7 Kan. 210.
Francis v. R. R. Co., 19 Kan. 303.

La. State Lottery Co. v. New Orleans, 24 La. An. 86.
New Orleans v. Kaufman, 29 La. An. 283.
New Orleans v. Davidson, 30 La. An. 554.
New Orleans v. Fourchey, 30 La. An. 910.
People v. Auditor, 7 Mich. 84.
Youngblood v. Sexton, 32 Mich. 406.
State v. Runyon, 41 N. J. Law 98.
Kittanning Coal Co. v. Commonwealth, 79 Pa. St. 100.
Mississippi Mills v. Cook, 56 Miss. 40.
Illinois Cent. R. R. Co. v. McLean, 17, Ill. 291.
Hunsacker v. Wright, 30 Ill. 146.
[illegible] v. Crittenden Co., 19 Ark. 360.
St. Louis R. R. Co. v. Berry, 41 Ark. 509.
Ark. M. R. R. Co. v. Berry, 44 Ark. 17.
Cairo R. R. Co. v. Parks, 32 Ark. 131.
Memphis R. R. Co. v. Berry, 41 Ark. 436.

In Wisconsin it was for a long time held, even under her peculiar constitution, that exemption was precluded. It was so held in

M. & M. R. R. Co. v. Supervisors, 95 Wis. 431.
Weeks v. Milwaukee, 10 Wis. 242.

But a different rule was finally adopted.

W. C. R. R. Co. v. Taylor, *supra*.

The argument upon which the final decision of that court rested tells for the defendant in error in the case at bar, and affords no room for doubt that had the Wisconsin constitution been like that of Minnesota the decision would have been different. At page 63 of the opinion the Court say:

"The import of the provision in the Iowa constitution was the nearest approach to the one adopted in this state, but the phraseology used was very different. The question of prohibiting all exemptions and authorizing certain exemptions was brought prominently before the convention, and after discussion to the effect that the naming of certain exemptions would impliedly prohibit the legislature from granting any others, the convention refused to specifically name the property to be exempted, so an amendment was proposed in these words: 'Sec. 1. All taxes levied in this state shall be uniform and equal, and shall be assessed upon a just valuation of real and personal property.' But the amendment with another section relating to exemptions was voted down. This proposed section so voted down was almost identical with a portion of the section then existing in the constitutions of Tennessee, Arkansas, Louisiana and Texas; but in Texas, Arkansas and Louisiana it had an additional feature.

"The section originally proposed in open convention was 'Sec. 1. All taxes levied in this state shall be as *nearly equal* as may be;' *with another section covering exemptions*, but finally the latter section was stricken out, * * * and the first section was amended by adding the words 'and shall be levied upon such property as the legislature shall prescribe.' * * *

"It would appear from the debates in the convention that some were in favor of binding the legislature firmly both as to taxation and exemptions,

while there were others who favored flexibility as to both. The result was a compromise and the adoption of the unique expression upon the subject found in our fundamental law. Possibly it would have been better for the people at large had the constitution, in addition to a *uniform rule of taxation, required an equality of valuations and assessments, and prohibited all discriminations by provisions similar to those which then existed in some of the constitutions to which we have referred.*"

Criticising one of the earlier decisions of that court holding to a contrary doctrine (*Weeks v. Milwaukee*, 10 Wis. 242), and wherein a remark of the court in *Exchange Bank v. Himes*, 3 Ohio St. 15, that "uniformity in taxation implies equality in the burden of taxation" was approved, the court further say at page 70:

"But the learned justice failed to note that Bartlett, C. J., was construing a section in the Ohio constitution adopted three years after the constitution of this state was adopted, and which, instead of following the language of our constitution, read as follows: 'Laws shall be passed taxing by a uniform rule *all* (the italics are the courts) moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also *all* real and personal property according to its true value in money' except certain exemptions named. And so it appears that Bartlett, C., J., was construing a constitution containing an important provision taken from constitutions which our convention in substance refused to adopt; and hence he said: 'This

provision requires *all property* of every description in the state to be taxed by a *uniform rule* and at its *true value in money*, with the exception of certain enumerated exemptions.' (The italics are in the original.) *Under such a provision there would be no difficulty in holding that all property of every description in the state must be taxed at its true value in money by a uniform rule, and hence the burden of taxation would necessarily be equal.* But the legislature of Wisconsin were never under any such constitutional restriction, and the people in the constitutional convention expressly refused to so limit the legislative power."

Further on the court in support of its decision calls attention to the language of Brewer, J., in *Francis v. A. T. & S. F. R. R. Co.*, 19 Kan. 303, hereinafter quoted.

No such question arose in *Trustees v. State*, *supra*, as in the case at bar. The statute of Iowa provided for the exemption of "all public libraries, grounds and buildings of literary, scientific, benevolent, agricultural, and religious institutions and societies devoted solely to the appropriate objects of these institutions." The main question there decided was whether the residence of a professor of a college, and the residence of a bishop who was rector of a church, were exempt under the said statute. The only other question considered was whether the statute violated Sec. 3, Article 1, of the constitution of that state prohibiting the making of a law respecting an establishment of religion or the free exercise thereof, or compelling one to attend or maintain a place of worship.

It is obvious that the constitution of that state is so radically unlike that of Minnesota that any decision arising

under it would throw little if any light upon the question at bar.

In the case of *M. F. F. S. & G. R. R. Co. v. Morris*, supra, the only constitutional question presented was whether the tax was assessed in a constitutional mode. It appears that railroad property was not assessed by the same officers by whom other property was assessed. The Court in answering the objection say:

> "It will be seen that the counsel for the plaintiff misconstrues the constitution. The constitution does not require that the manner or mode of assessing and taxing property, or the manner and mode of collecting the taxes shall be equal and uniform; but it simply requires that all property shall be assessed and taxed at an equal and uniform rate."

In *Francis v. Railroad Co., supra*, the question was whether a statute was valid which provided for the collection of such taxes on railroad property in the unorganized counties of the state. Inasmuch as all other property in such counties escaped taxation under the then existing laws, it was objected that the statute was void as providing unfair, partial and discriminating taxation. The Court by Brewer, J., at pages 312-314, quotes the constitutional provisions of the several states and observes:

> "In all these provisions will be noticed either an express direction to tax *all* property or an express prohibition on exempting any other than certain specific property. Our constitution contains neither. Does not it mean the same without as those do with. The positive language of these several sections sustains, if it does not compel, the positive assertions of the

> various decisions cited by counsel. Those decisions rest upon the clear commands and prohibitions of the constitution upon which they were based, and are therefore only of limited and qualified application here."

In further justification of the decision in the case last cited the Court say:

> "In a limited sense it may be said that there is a disregard of the obligation of uniformity because there is no attempt to reach all property; but in a higher and better sense it is clear that there is secured an equality and uniformity in the burden of taxation. The spirit is present though the letter may be wanting."

Keeping in mind the language of the constitution of Kansas, the peculiar statute involved, and the additional comment upon the constitutional provisions of other states referred to in the opinion, it is plain that the force of the decision supports the contention of the defendant in error in the case at bar.

In *Louisiana Lottery Co. v. City, supra*, no question of contract was presented, but merely the authority of the legislature to commute the tax of the plaintiff.

In *City of New Orleans v. Kaufman, supra*, was involved an ordinance of the city of New Orleans exacting a license from junk dealers. Held that it did not violate the rule of uniformity or equality.

In *New Orleans v. Davidson, supra*, was involved the question whether the legislature was authorized to exempt certain real and other property.

Reference to the constitutional provisions of Louisiana as sufficient to demonstrate the correctness of the above decisions.

People v. Auditor, and *Youngblood v. Sexton, supra,* were rightly decided in view of the constitution of Michigan, which has not only adopted a rule of uniformity, but declared "taxes shall be levied on such property *as shall be prescribed by law.*

State v. Runyon, supra, was rightly decided under the constitution of New Jersey; yet in truth there was no valid ground for the objection made to the statute. It was a question whether the rule of uniformity had been observed in the taxation of mortgages. How little merit there was to the objection appears from the following excerpt from the decision:

> "The precise objection made by counsel to this law in this respect is that it lacks the quality of uniformity in that it does not subject all mortgages alike to taxation, but leaves the question whether the owner of a mortgage shall submit to taxation on it at the will or caprice of the mortgagee. If regard be had to the substance of the law, and not to mere form, it is apparent that all mortgage interests are in effect made by this act liable to taxation. If the mortgagee chooses to pay that part of the tax which would be represented by the value of the interest of the mortgagee, he may do so. In that event the mortgaged premises are valued without any abatement in valuation because of the mortgage debt. If, on the other hand, the mortgagee is unwilling to pay that part of the taxes which is

> appertainable to the mortgage interest, he may do so by claiming a deduction thereof, and in that event instead of taking a receipt for that portion of the tax as he was permitted to do under the act of 1854, and being allowed the amount on account of the interest of the mortgage debt, he may do so by simply claiming a deduction, and then the tax is laid in form directly upon the mortgage."

Kittanning Coal Co. v. Commonwealth, *supra*, was another case involving only the question of uniformity. The question of the effect of the enumeration of specific exemptions upon the power of the legislature of that state to make additional exemptions, can never arise, because of the effect of Sec. 2, of Article 9, which makes all such attempts void.

In *Miss. Mills v. Cook*, *supra*, it is expressly held that while the legislature may exempt classes of property from taxation, it cannot withdraw property from taxation beyond the reach of legislative recall or influence.

The Court say, at page 54:

> "The true view is that this provision of the constitution fixes beyond legislative act the condition of the property of all corporations for pecuniary profit as being always liable to the exercise of the taxing power, so as to subject it at the will of the legislature to the same taxation as the property of individuals may be subjected to. The legislature may exempt property of a certain class, whether owners be corporations or natural persons, but corporate property shall never be placed beyond the reach of the taxing power. It may not be taxed,

> but it must be ever liable. It need not be 'subjected' but it must always be 'subject' to taxation the same as that of individuals, for the constitution so declares. The provision is *mandatory* as to universal liability to be taxed, but *permissive* to the legislature to tax the property of such corporations or exempt it, as it may see proper, in common with the property of individuals which may be taxed or not for the time being."

In short, under the constitution of that state, the legislature cannot enter into contracts, irrevocable or otherwise, granting away the sovereign right of taxation. This was so in the face of language less stringent than that of Section 3, Article 9, of the constitution of Minnesota.

In *Illinois C. R. R. Co. v. McLean, supra*, the court sustained the gross earnings law. This was based upon the language of the constitution which empowered the general assembly to tax "persons using and exercising franchises and privileges, in such manner as they shall from time to time direct."

But in the later case of *Hunsacker v. Wright, supra*, it was expressly held that while the legislature might commute, it had no power under the constitution to *exempt any person or class of persons from the payment of taxes*, a doctrine which had been announced in earlier decisions, *Trustees v. McConnell*, 12th Ill. 138, and is adhered to in later cases.

Northwestern University v. People, 80 Ill. 333.
Same v. Same, 86 Ill. 141.

The question of contract was not presented or considered in any of the Illinois cases above cited.

Under the constitution of Arkansas the legislature is held authorized to select the classes of property "*subject to taxation.*" In *State v. Crittenden Co.*, 19 Ark. 360, the words "subject to taxation" were italicized. In the case of *Pike v. State*, 5 Ark. 205, the right of exemption was denied, but that decision is overruled by later ones in that state.

The same doctrine is declared by other courts.

Cranford v. Linn Co., 11 Ore. 494.

Railroad Co. v. Miller, 19 W. Va. 408.

Jamesville v. Auditor, 5 Ohio, St. 589.

People v. McCreery, 34 Cal. 432.

Nashville & K. R. R. Co. v. Wilson (Tenn.) 15 S. W. R. 446.

Huntington v. Worthen, 120 U. S. 97.

La. Cotton Mfg. Co. v. City of N. O., 31 La. An., 440.

Rd. Co. v. Gaines, 97 U. S. 697.

State v. Rd. Co., 75 Mo. 208.

(*Hunsacker v. Wright*, 30 Ill. 146, criticized. *Hogg v. Mackay*, 31 Pac. 780.)

The constitution of Oregon provided that "All taxes shall be equal and uniform," and the legislature "shall provide by law for uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property."

In *Hogg v. Mackay* the Court say:

> "The language of the constitution is plain, simple, and easily understood, and manifestly operates as an absolute inhibition against the exemption, either

> directly or indirectly, of any property from taxation except that specially enumerated."

The constitution of Arkansas was construed in *Huntington v. Worthen*, 120 U. S. 97, when this Court, by Justice Field, say:

> "As thus seen, no part of the property of railroad companies in the state is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly."

It adds nothing to the legal force of the constitution that it expressly provides that laws attempting to exempt enumerated classes of property shall be void. Such a clause but serves to emphasize what precedes. This Court say, in the case last cited, that "*No part of the property of railroad companies in the State is exempt from taxation.*" A law is necessarily void which contravenes the constitution.

A reservation in a certain grant of public lands was held unnecessary to effect the reservation and served merely to render more certain what had been granted.

L. etc. R. R. Co. v. United States, 92 U. S. 733.

V.

The second clause of Section 9, specifying the classes of property which may be exempted, is exclusive of any further right of exemption.

A similar question arose in New Hampshire where it was construed that under one provision of the constitution of that State the requisite power had been conferred to provide for the taxation of certain property. But the contention was answered as follows:

> "But if it is claimed * * that the power of taxation is conferred by Article 2 of our constitution, which declares that 'the supreme legislative power in this state shall be vested in the senate and house of representatives, each of which shall have a negative upon the other; * * * it may be urged in reply, that, granting all the power of taxation is conferred by Article 2, it is limited and restricted by the terms of Articles 4 and 5, which follow. Those articles define, with great particularity, the power which may be exercised by the general court, and would seem to confer all the power required by that body to enable it 'to provide for the necessary defence and support of the government, and the protection and preservation of the subjects thereof.' If Articles 4 and 5 were not understood and intended as restrictions and limitations upon the general power conferred by Article 2, it is difficult to understand why they were inserted. They were unnecessary, for they do not enlarge the power of the general court as conferred by Arti-

cle 2, and unless they may be treated as restrictions they are useless. If they are restrictions, it might be suggested that the whole power of taxation is contained in that part of Article 5 which authorizes the levy of proportional and reasonable taxes on all inhabitants and residents of and estates within the state; and that they restrict the power not only to the manner of the levy, but to the subjects upon which it can be exercised, viz., persons and estates."

State v. Express Co., 60 N. H. 241.

It is not uncommon to find a grant in indefinite general terms, limited and explained by a subsequent enumeration of particulars; and when such enumeration is clearly and explicitly made, it must be construed to control the general terms, for otherwise it will be merely idle and nugatory. *Opinion of Justices*, 4 N. H. 565.

In a constitution, the great purpose of which was to define and limit the powers of government, it cannot be supposed that the power to levy and assess taxes would be granted to the legislature without any obligatory restraint on its exercise. No power is capable of greater abuse, or can be made more oppressive and odious in practice. Of this the framers of the constitution and their contemporaries have had abundant experience and knowledge. Nor can we doubt that by the use of words in the constitution the natural import of which is to put a limit on the exercise of this power, they intended them to have that operation and meaning.

Oliver v. Washington Mills, 11 Allen, 268.
Taylor v. Chandler, 56 Tenn. 366.
City of Zanesville v. Auditor, 5 Oh. St. 593.
Fletcher v. Oliver, 25 Ark. 289.

C. & O. R. R. Co. v. Miller, 19 W. Va. 408.
Hogg v. Mackay, 31 Pac. 780.

VI.

Authority to prescribe a form of taxation appropriate to a given business, like a per centum tax upon the gross earnings of a railroad company, does not imply authority to contract away the right of taxation, wholly or in part.

The infirmity of the argument of the plaintiff in error consists in assuming, *first*, the existence of a legislative authority to contract, and, *second*, that the gross earnings method was intended to be a contract, both of which propositions are denied by the defendant in error. Conceding for the purposes of argument only, that under the Minnesota constitution a gross earnings method of taxation is permissible, we contend that, save for the effect of the constitutional amendment of 1871, the legislature is at liberty to change the rate at any time, as justice may require, or to wholly abrogate the method whenever, in its judgment, it shall be deemed advisable. The method adopted does not rest in contract, but springs from legislative power, and may be withdrawn.

Meker v. Ferguson, 22 Wall. 528.
West Wis. Ry. Co. v. Brd of Supervisors, 93 U. S. 595.
Bailey v. Maguire, 22 Wall. 217.
Railway Co. v. Philadelphia, 101 U. S. 529.
Salt Co. v. E. Saginaw, 13 Wall. 375.

R. R. Cos. v. Gaines, 97 U. S. 697.
N. Orleans C. & L. R. Co. v. N. Orleans, 143 U .S. 192.

VII.

Assuming that a gross earnings tax is a legitimate exercise of the taxing power, and that no contract right was acquired by virtue of the special laws in question, it follows that the question is not at all embarrassed by the fact that under the said laws the gross earnings taxes were in lieu of other taxation upon both the granted lands and other property of the railroad companies.

It was clearly within the power of the legislature to subject the granted lands to the ordinary method of taxation. Nor is it material that in the act submitted to and ratified by the people of the State effecting such a change of policy, no reduction was made or authorized in the existing rate. Whether the rate as applied to the property essential to the operation of the railroad be or be not excessive, or unjust, is not a judicial question. All such questions must be addressed to the legislature rather than to the Court.

Nathan v. Louisiana, 8 How. 82.
McCulloch v. Maryland, 4 Wheat. 419.
Providence Bk. v. Billings, 4 Pet. 561.
People v. Flagg, 46 N. Y. 401.
Merriwether v. Garrett, 102 U. S. 472.
Kirtland v. Hotchkiss, 100 U. S. 491.

VIII.

No such trusts inhered in the grants by the acts of Congress as to suspend, or render inapplicable, the operation of Art. 9, Secs. 1 and 3 of the Constitution of Minnesota.

If it be insisted in this Court, as it was in the State Supreme Court, that the State constitution was not intended to prevent the legislature from entering into contracts with the said grantees, we reply that such contention finds no support in the language of the Minnesota constitution. That it was clearly within the power of the legislature to tax such lands in specie as soon as the title therein rested in the respective companies, is elementary. Neither the granting acts, nor the constitution of Minnesota, expressly provide for such exemptions. As to swamp lands, this Court has held that the grants thereof imposed no trusts upon the State.

U. S. v. Louisiana, 127 U. S.

As to the other grants this Court has said:

> "It is a conclusive answer to the propositon we are now considering that the United States have no more claim, legal or equitable, touching the lands here in question, than they have to lands which they have sold and patented to others in the regular course of the administration of the Land Department of the Government; and that Congress has not seen fit, either expressly or by implication, to impose any restriction upon the taxing power of the state. That subject was remitted, as, under the circumstances, it might well be, wholly to their wisdown and discretion."

Tucker v. Ferguson, 22 Wall. 527.

The moment it is held that the Constitution of Minnesota prohibits the exemption from taxation of any other than the enumerated classes of property, nothing remains on which an argument can be founded that granted lands can be excepted from the operation of the constitutional rule. A plain case is then presented for the application of the doctrine that no exemption can be presumed.

N. O. C. R. R. Co. v. New Orleans, 143 U. S. 192.

> "A state cannot strip itself of this most essential power by doubtful words. It cannot, by ambiguous language, be deprived of this highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from."
>
> *Erie R. R. Co. v. Pennsylvania*, 21 Wall 492.

But this question is fully and completely disposed of in *Tucker v. Ferguson, supra.* It was there, as here, contended that the State, as trustee of the United States, was at liberty to enter into any contract it deemed advisable regardless of the provisions of the State constitution. That contention was strongly pressed upon the consideration of this Court, and was met and overthrown. There the state constitution reserved the right to alter, amend or repeal all laws under which corporations were organized. It will be readily perceived that, so far as the right to act in effectuating the so-called trust, is concerned, the question is the same whether arising under such a constitution or under that of the State of Minnesota. The argument in either case is that the constitution does not apply because the

trust presents a case *sui generis* and not within the contemplation of the constitution.

In *Tucker v. Ferguson*, it was urged by counsel in their brief that the State, as trustee, *had an interest in the lands inconsistent with taxation;* that it could and did enter into an indefeasible contract "that none but specific taxes should be imposed," and that the repeal of the act whereby the contract was made impaired its obligation.

In answer to such contention this Court there said:

> "The State accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in anywise abdicate her sovereignty by accepting the trust, but the former might be exercised to render more effectual the discharge of the latter. She was in nowise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be ultra vires and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further.

> Upon general principles she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the State, proceeding in the execution of the trust, had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect."

If the contention is sound here it must have prevailed there. We submit that the question is foreclosed by the decision in that case.

IX.

Under Article IX, Section 1, of the Constitution of Minnesota, prescribing a rule of equality and uniformity, the Legislature was prohibited from taxing the lands of railroad companies at a less rate, or by any other rule, than that by which similar property of owners was taxed.

The reason which justifies the adoption of a gross earnings tax as to ordinary railroad property, i. e., property which is essential to the operation of the business of a railroad company, repudiates the taxation of land acquired by grant by the same rule.

Even under laws where the property of a railroad company was deemed exempt, the courts, with marked unanimity of opinion, have held that the exemption did not extend to all property of the company regardless of the pur-

poses for which it was held or the uses to which it wes devoted.

State v. Newark, 26 N. J. L. 519.
Cooley on Taxation, 151.
County of Ramsey v. C., M. & St. P. Ry. Co., 33 Minn. 537.
County of St. Louis v. St. P. & D. R. R. Co., 45 Minn. 45.
25 *Amer. & Eng. E. of L.,* 162, note 2, citing numerous cases.

The same strictness of rule obtains against relieving any owner of a given class of property of his just proportion of the tax, even where it is held that the legislature may exempt the class.

Bright v. McCullough, 27 Ind. 223.
Dailey v. Snap, 47 Miss. 387.
Palmer v. Strump, 29 Ind. 329.
People v. Whyler, 41 Cal. 351.
Portland Bank v. Anthorp, 12 Man. 252.
State v. Express Co., 60 N. H. 242.
City of Zanesville v. Auditor, 5 Oh. St. 593.
Loftin v. Citizen's Nat. Bank, 85 Ind. 341.

Such provisions are intended to prohibit discrimination in favor of or against persons and classes, either of persons or of property.

Lehigh Iron Co. v. Lower, 7-81 Pa. St. 482.
Fletcher v. Oliver, 25 Ark. 289.
Primm v. Belleville, 59 Ill. 142.
Youngblood v. Sexton, 32 Mich. 406.
People v. Weaur, 100 U. S. 539.
Ger. Nat. Bank v. Kimball, 103 U. S. 732.

Corporations fall within the purview of such provisions

as well as private individuals and all other subjects of taxation.

Clark v. Mibit, 67 Ala. 217.
Ottawa Gas Light Co. v. Downey, 127 Ill. 201.
Davenport v. Chi. etc. R. Co., 38 Ia. 633.

Conformity to their requirements is an indispensible prerequisite to the validity of a tax imposed in a State when such a provision is in force.

Sleight v. People, 74 Ill. 47.
People v. Henderson, 12 Col. 369.
Northampton v. Hampshire Co., 145 Mass. 108.
State v. Cumberland, etc., R. Co., 40 Md. 22.
Wis Cent. R. Co. v. Taylor, 52 Wis. 37.

Taxes are equal and uniform when all within the limits of the district share equal benefits therefrom, or when they are imposed uniformly upon all property or things of the same description.

Smith v. Aberdeen, 25 Miss. 458.
Palmer v. Stumph, 29 Ind. 329.
Morris v. Waco, 57 Texas 635.
Dyar v. Farmington, 70 Me. 515.

Conclusion.

To summarize the contentions urged on behalf of the defendant in error, we say:

1. That the exemptions claimed on behalf of the several railroad companies whose lands are involved in this suit, are based upon statutes enacted subsequent to the adoption of a constitution by the State in 1858.

2. That that constitution, as held by the Court below, prohibited the legislature from contracting away, wholly or in part, the right to tax the said lands and that they could not lawfully be taxed otherwise than by the rule of uniformity therein provided.

3. That the amendment to the constitution of that State in 1871 operated as a *temporary validation* of the several statutes in question providing for a per centum method of taxation.

4. That such method of taxation was subject to change at any time when effected in the manner provided by the said amendment.

5. That the percentum method of taxation is not a contract at all, but a system of taxation which rests in and derives its force from the sovereign will as expressed in the said amendment.

6. That it necessarily follows from the foregoing postulates, that the lands in question might be brought under the general and ordinary method of taxation, without affecting, so far as this Court is concerned, the question as to the manner in which the remaining properties of the said companies should be taxed, that being a question of purely state policy, the validity of which must be determined, if at all, in other, than the present, litigation.

7. That the right of exemption must rest upon clear and express provisions of law unembarrassed by any question of doubt, and that doubt is fatal to it.

West Wis. R. Co. v. Board of Supervisors, 93 U. S. 595.

8. That the grants to the State by Congress, whether as to swamp or other lands, were not intended to, nor did they, operate to clothe the legislature with the power to stipulate away the sovereign right of taxation as to such lands; for to concede that the power existed to exempt such lands from taxation for any time carries with it the power to so exempt them for all time. There is no halting place between the power to provide for temporary and perpetual exemption.

West Wis. R. R. Co. v. Board of Supervisors, 35 Wis. 267, citing *Washington University v. Rouse*, *supra*.

9. That it is, at best, a harsh doctrine that a legislature can in any case contract away the sovereign power of taxation, and it should therefore be restricted to those cases where the claim rests upon clear and unmistakable terms.

For such reasons, it is respectfully submitted, that the judgment of the State Supreme Court should be affirmed.

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